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No. 74

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY LA FRANCA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court (R. 7) is reported in 26 F. (2d) 706, and that of the Circuit Court of Appeals (R. 28) in 37 F. (2d) 269.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 7, 1930. (R. 30.) The petition for certiorari was filed April 7, 1930, and was granted May 5, 1930. (R. 30.) Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a suit at law to recover from the respondent—

(*a*) A special tax on retail liquor dealers provided by Section 3244 R. S., doubled by Section 35, Title II, of the National Prohibition Act ($37.50);

(*b*) A special tax provided by Section 701 of the Revenue Act of 1924 for engaging in the business of a retail liquor dealer in Louisiana contrary to the law of that State, doubled by Section 35, Title II, of the National Prohibition Act ($1,500);

(*c*) A penalty ($4.68) provided by Section 3176 R. S., as amended, for failure to file a return as a retail liquor dealer, and

(*d*) A penalty ($500) provided by Section 35, Title II, of the National Prohibition Act for retail dealers selling intoxicating liquor in violation of that Act—

assessed against the respondent, who had been convicted and fined under the National Prohibition Act for unlawfully selling liquor, is barred by Sec. 5 of the Willis-Campbell Act.

2. Whether such suit placed the respondent in double jeopardy in violation of the Fifth Amendment.

3. Whether paragraph 9 of Section 701 of the Revenue Act of 1924 is constitutional.

STATUTES INVOLVED

These are set forth in an appendix to this brief, pp. 35–37, *infra*.

STATEMENT

A suit at law was instituted November 9, 1927, by the United States in the District Court to recover from the respondent $2,042.18 in taxes and penalties. The petition alleged in substance that the defendant on specified dates within the period from October 10, 1924, to April 25, 1925, sold intoxicating liquor in a certain restaurant of which he was proprietor to persons named; that by reason of such sales he had become a retail liquor dealer subject to the following taxes for the nine months ending June 30, 1925:

> (1) Retail liquor dealer's tax, imposed by Section 3244, Revised Statutes, doubled under Section 35, Title II, of the National Prohibition Act, $37.50.
>
> (2) A penalty, imposed by Section 3176, Revised Statutes, as amended, for failure to make and file a return on October 10, 1924, $4.68.
>
> (3) A special tax imposed by Section 701 of the Revenue Act of 1924 for engaging in the business of a retail liquor dealer in the State of Louisiana contrary to the law of that State, doubled under said Section 35, $1,500.[1]

---

[1] The tax imposed by Section 701 of the Revenue Act of 1924 (pp. 36–37, *infra*) for engaging in the business of a retail liquor dealer in violation of local law is $1,000. In the instant case the tax was assessed for nine months, or three-fourths of a year, and amounted to $750. This amount was doubled under Section 35, Title II, of the National Prohibition Act.

(4) A penalty imposed by Section 35 upon retail dealers selling intoxicating liquor in violation of the National Prohibition Act, $500.

The petition further averred that in case No. 10124 on the docket of that court the defendant had on April 28, 1926, pleaded guilty to and had been convicted of selling intoxicating liquor. (R. 1–5.)

By plea of former jeopardy, general demurrer, and plea of *res adjudicata,* the defendant sought to have the suit dismissed on the grounds: (1) That the charges upon which he had been convicted in case No. 10124, were identical with and provable by the same evidence as were the charges upon which the taxes and penalties were sought to be recovered, and (2) that the action was barred by Section 5 of the Willis-Campbell Act. (R. 5, 10–11.) These pleas were overruled (R. 7, 11), the trial court holding that the present action was not a criminal prosecution so as to bring it within the bar of the Fifth Amendment or within Section 5 of the Willis-Campbell Act (R. 7–10). Thereafter an answer and supplemental answer were filed alleging that Paragraph 9 of Section 701 of the Revenue Act of 1924 was unconstitutional in that it imposed a penalty for violation of State law. (R. 12–13.) A jury was waived and a stipulation of facts filed (R. 14–19) substantially the same as those alleged in the petition (R. 15). Judgment was entered in favor of the United States for the full sum of the

taxes and penalties (R. 23), and a motion for a new trial denied (R. 22–23).

Upon appeal the judgment was reversed by the Circuit Court of Appeals upon the ground that the suit was barred by Section 5 of the Willis-Campbell Act. (R. 28–30.) This Court thereafter granted a writ of certiorari. (R. 30.)

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

2. The Circuit Court of Appeals erred in holding that the present action is barred by Section 5 of the Willis-Campbell Act.

SUMMARY OF ARGUMENT

The provision of Section 5 of the Willis-Campbell Act, held by the court below to bar the present suit, applies only where the act in question is a "violation" *both* (1) of the National Prohibition Act or Supplemental Act and (2) of the prior internal revenue laws, and is effective as a bar only against a "prosecution" for such "act or offense" under one of such laws after there has been a conviction therefor under the other.

The Government contends that none of the items in suit were within the bar of the Willis-Campbell Act. Some of the items can not be regarded as penalties. Others, if so regarded, did not arise from an act or acts for which the respondent was previously convicted, and others were not incurred for any "violation" of a "law in force when the

National Prohibition Act was enacted" within the meaning of the Willis-Campbell Act.

If the items in question are not to be regarded as penalties, the Government's right to recover is plain. If they are to be regarded as penalties the decisions of this Court in *Lipke* v. *Lederer,* 259 U. S. 557, and *Regal Drug Co.* v. *Wardell,* 260 U. S. 386, are not controlling, because there was no attempt to distrain for the collection of these items as in the cited cases. This was a plenary suit, in which the Government was clearly entitled to recover the penalties unless recovery was barred by Section 5 of the Willis-Campbell Act or on grounds of double jeopardy.

The intent of Congress that the liquor taxes imposed by the internal revenue laws should be collected from persons illegally, as well as those legally, dealing in liquor, and that the collection of taxes on illegal dealings in liquor should not be inhibited because of the enforcement of any criminal liability arising from those dealings, is clearly evidenced by provisions in Section 35 of the National Prohibition Act, by Section 5 of the Willis-Campbell Act, by the report of the Senate Judiciary Committee dealing with the section of the bill which became Section 35 of the National Prohibition Act, by the report of the House Judiciary Committee on the bill which became the Willis-Campbell Act, and by decisions of this Court. *United States* v. *One Ford Coupe,* 272 U. S. 321.

Assuming that the question is before this Court, the respondent's contention that he was subjected to double jeopardy is untenable. His prior conviction was for selling liquor in violation of the National Prohibition Act, whereas the instant suit, if regarded as a prosecution for an offense, was a prosecution for a different offense, that is, for conducting business as a retail liquor dealer.

Moreover, where, as in the instant case, the Legislature clearly provides that the doing of a certain act shall be subjected both to a penalty and to a criminal prosecution, a suit for the penalty may be maintained after the offender has been prosecuted and convicted of the offense for which the penalty is sought to be collected.

Paragraph 9, Section 701 of the Revenue Act of 1924, imposing a tax upon "Every person carrying on the business of a * * * retail liquor dealer * * * in any State * * * contrary to the laws of such State," is not repugnant to the Tenth Amendment of the Constitution, in that it encroached upon the power reserved to the States to determine what punishment should be imposed for infractions of their laws. The exaction in question is, as the name given it in the statute implies, a tax. That Congress may tax businesses which are prohibited by State law is clear.

But, even if regarded as a penalty, the "tax" imposed by Section 701 is not open to the constitutional objection urged by the respondent. Prior to the adoption of the Eighteenth Amendment, the

validity of the Webb-Kenyon Law, which penalized the introduction of liquor into any State for purposes prohibited by the laws of such State, was upheld by this Court, as was the Reed Amendment, prohibiting the transportation of liquor into any State whose laws prohibited the manufacture or sale therein of liquor for beverage purposes.

ARGUMENT

I

THE SUIT IS NOT BARRED BY SECTION 5 OF THE WILLIS-CAMPBELL ACT

The provision of Section 5 involved is:

> * * * but if any act is a violation of any of such laws [that is, "laws that were in force when the National Prohibition Act was enacted"] and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other.

Under its plain terms the foregoing provision applies only where the same act is a "violation" both of the National Prohibition Act or Supplemental Act and of such antecedent laws, and the bar is against a "prosecution" for "such act or offense" under one of such laws after there has been a conviction therefor under the other.

The court below held this case within the bar of Section 5 by the following reasoning: (1) The amounts sought to be recovered are penalties or fines for criminal misconduct, citing *Lipke* v. *Lederer*, 259 U. S. 557; *Regal Drug Co.* v. *Wardell*, 260 U. S.

386; (2) a civil suit for the recovery of such penalties is a "prosecution" for an offense; and (3) since the penalties sued for arose from acts (*a*) which were violations of *both* the National Prohibition Act and the prior internal revenue laws, and (*b*) of which the respondent had been convicted under the National Prohibition Act, the present suit was a "prosecution" which was barred by Section 5 of the Willis-Campbell Act.

The Government contends:

(1) The *reasoning* of the court below can have no application to the items involved in this suit.

(2) The basic tax imposed upon retail liquor dealers by Section 3244 of the Revised Statutes is not a "penalty."

(3) Assuming that the items here involved are "penalties" the legislative intent is clear that they should be collected regardless of a prior criminal conviction for the acts upon which the penalties are based.

The reasoning of the Court below has no application to the items involved in this suit.

1. The item of $4.68, referred to as a "penalty" in the petition, was assessed under Section 3176 of the Revised Statutes, as amended (Act of June 2, 1924, c. 234, 43 Stat. 253, 339–340), which provides that in the event of a failure to file a tax return within the time prescribed by law the Commissioner of Internal Revenue "shall add to the tax 25 per centum of its amount." Clearly the respondent's failure to file a return was not involved in his

prior conviction, and if the present suit is a "prosecution" for the act in question it is a prosecution for an act for which there has been no prior conviction.

2. The penalty of $500, sought to be recovered because of the respondent's having illegally sold liquor as a retail dealer, was imposed by Section 35 of the National Prohibition Act. As the respondent's prior conviction was under *this same Act*, it is obvious that a suit to recover that penalty does not come within the bar of Section 5.

3. Liability for the *additional amounts resulting from the doubling,* under Section 35 of the National Prohibition Act, of the retail liquor dealer's taxes imposed by Section 3244 of the Revised Statutes and Section 701 of the Revenue Act of 1924 arose solely under *the National Prohibition Act*—the same Act under which the respondent had been previously convicted. The bar of Section 5 accordingly could not apply to a suit for the recovery of these additional amounts.

4. The *basic* retail liquor dealers' tax of $18.75 (See item (1), p. 3 *supra*) was imposed under Section 3244 of the Revised Statutes. Section 3244 is not a criminal statute and does not purport to make unlawful the engaging in business as a retail liquor dealer. Obviously the respondent did not "violate" that statute. Section 5 of Willis-Campbell Act only applies where the same act is a "violation" of both the National Prohibition Act and the prior revenue laws.

5. The tax imposed under Section 701 of the Revenue Act of *1924* for carrying on the business of a retail liquor dealer in Louisiana contrary to the law of that State did not arise from an act which was a violation of a law "in force when the National Prohibition Act was enacted."

While the foregoing may suffice to dispose of the entire case so far as Section 5 of the Willis-Campbell Act is concerned, we feel warranted in discussing in more detail the taxes imposed under Section 3244 R. S. and Section 701 of the Revenue Act of 1924.

The court below held that all the items involved were penalties upon authority of *Lipke* v. *Lederer* and *Regal Drug Co.* v. *Wardell, supra.*

Lipke v. *Lederer* was a suit to enjoin a threatened collection by distraint, upon an assessment made without notice or opportunity to be heard, of an additional or "double tax" of $45.83, and penalty of $500, under Section 35 of the National Prohibition Act, and of a so-called "penalty" under Section 3244 of the Revised Statutes. The assessment was based upon alleged sales of liquor by Lipke in violation of the National Prohibition Act. This Court held that as Lipke's liability was predicated upon acts which were violations of law, the monetary exactions in question were penalties, as distinguished from taxes, and therefore could not be collected in the summary way attempted. It said (pp. 561–562):

> When by its very nature the imposition is a penalty, it must be so regarded. *Helwig* v. *United States*, 188 U. S. 605, 613. Evidence of crime (§29) is essential to assessment under §35. It lacks all the ordinary characteristics of a tax, whose primary function "is to provide for the support of the government" and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty. *O'Sullivan* v. *Felix*, 233 U. S. 318, 324.
>
> * * * we can not conclude, in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be enforced through the secret findings and summary action of executive officers.

In *Regal Drug Co.* v. *Wardell* a similar suit was brought to enjoin the collection by distraint of (a) "taxes" upon distilled spirits and wines and for conducting the business of a rectifier, (b) a penalty of $500 under Section 35 of the National Prohibition Act for illegally selling liquor as a retail dealer, and (c) a penalty of $1,000 under the same statute for illegally manufacturing liquor, all of which "taxes" and "penalties," totaling $75,592.61, were assessed without notice or opportunity to be heard given the Drug Company. While conceding in this Court that, in view of *Lipke* v. *Lederer*, the *penalties* and *double taxes* which had been assessed under Section 35 of the National Prohibition Act could not be collected by summary procedure, the Government contended that there was nothing in that

decision to prevent the summary collection of *taxes* imposed by the internal revenue laws antedating the National Prohibition Act. This Court, however, held the case governed by *Lipke* v. *Lederer*.

At the time of withdrawing the distilled spirits and wines in question the Regal Drug Company paid all taxes due thereon under the revenue laws antedating the National Prohibition Act. The additional "taxes" sought to be collected were assessed upon the theory that the spirits and wines had been disposed of by the Drug Company for beverage purposes. These additional taxes were: (1) A so-called "differential tax" of $4.20 per gallon imposed by Section 600 (a) of the Revenue Act of 1918 (i. e., the difference between the tax of $2.20 per gallon theretofore paid by the Drug Company and the tax of $6.40 per gallon imposed by Section 600 (a) upon spirits withdrawn for beverage purposes); (2) a tax of forty cents per gallon on the sweet wines; (3) a tax of sixteen cents per gallon on the still wines, and (4) a tax of $93.75 "for having conducted the business of a rectifier in violation of the law." (Case No. 108, Oct. Term, 1922, R. 8.)

Liability for the tax of $4.20 upon the distilled spirits could arise *under the Revenue Act of 1918* only from an act which was a violation of law. The taxes assessed upon the wines, being at the same rate per gallon as the taxes thereon which had already been paid by the Drug Company, were obviously the additional amounts resulting from the

doubling of such taxes under Section 35 of the National Prohibition Act. Both the distilled-spirits tax and the wine taxes came, therefore, within the plain effect of the decision in *Lipke* v. *Lederer*. The so-called "penalty" of $93.75 was described in the Government's brief filed in this Court as—

> a tax of $75 * * * for conducting the business of a rectifier for three-fourths of a year (under Rev. Stat., sec. 3244, as amended by the act of Mar. 1, 1879, sec. 4, 20 Stat. 327, 333), plus 25 per cent for failure to make a return (under Rev. Stat., sec. 3176, as amended by the act of Feb. 24, 1919, 40 Stat. 1057, 1148), amounting altogether to $93.75.

The rectifier's tax assessed against the Regal Drug Co. was imposed by Section 3244 of the Revised Statutes upon "Every person who rectifies * * *." Although that statute made no distinction between lawful and unlawful rectification, the item of $93.75 assessed thereunder against the Drug Company was apparently regarded by this Court, like all the other items involved in that case, as a penalty. It is therefore true that in *Regal Drug Co.* v. *Wardell* an exaction which would unquestionably be a tax if liability therefor had been incurred by reason of a lawful act but which in fact arose from an act which was a violation of laws was not distinguished from other exactions of a penal character.

But in the later case of *United States* v. *One Ford Coupe*, 272 U. S. 321, this distinction was made clear. This Court there said (p. 328):

> *A tax on intoxicating liquor does not cease to be such because the sovereign has declared that none shall be manufactured, and because the main purpose in retaining the tax is to make lawbreaking less profitable.* What was sought to be enforced and held to be a penalty in *Lipke* v. *Lederer*, 259 U. S. 557, 561, was the so-called double tax. Here, we are dealing with the basic production tax.
>
> With respect to the character of the impositions called taxes there is nothing in either the Revenue Acts or the Prohibition Act which makes any distinction between the product of legal and illegal distillation. *The Acts left in effect the basic tax of $2.20 per gallon, which was and is a true tax on the product, whether legally or illegally distilled,* and added to it the additional amounts in case of illegal distillation or diversion to illegal uses. These additional amounts also are called taxes by Congress, and were understood by it to be such. Whether they were intrinsically penalties and should be treated as such we need not determine. *The basic tax of $2.20 a gallon on liquor illegally produced is not imposed because of illegality, but despite of it.* (Italics ours.)

Thereafter, in *Murphy* v. *United States*, 272 U. S. 630, this Court said (p. 632):

> *The mere fact that it [a tax] is imposed in consequence of a crime is not conclusive. A government may endeavor to prevent certain facts and yet provide that if they happen they shall yield as much revenue as they might have yielded if lawful. United States* v. *One Ford Coupe Automobile, ante,* p. 321. (Italics ours.)

Liability for the tax imposed upon retail-liquor dealers by Section 3244 of the Revised Statutes, the doubled amount of which was sued for in this case, is not by that statute made to depend upon the doing of an act which is a violation of law. That tax can not be distinguished in principle, therefore, from the basic production tax of $2.20 per gallon imposed by Section 600 (a) of the Revenue Act of 1918 which was held in *United States* v. *One Ford Coupe, supra,* to be a true tax. Being a tax, as distinguished from a penalty, a suit for its recovery is obviously not a "prosecution" for an "offense" within the bar of Section 5 of the Willis-Campbell Act.

Although the item of $1,500[2] involved (p. 3, *supra*) was imposed, as to $750 thereof, under Section 701 of the Revenue Act of 1924, that section was in lieu of a similar section in the Revenue Act of 1921, which in turn was in lieu of a similar provision in the Revenue Act of 1918. Accordingly the

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[2] The amount assessed under Section 701 of the Revenue Act of 1924 was only $750. This sum was held to be doubled under Section 35, Title II, of the National Prohibition Act. See footnote 1, p. 3, *supra.*

Court may consider that this item was imposed under a revenue law in force prior to the National Prohibition Act. Moreover, the liability for the "tax" imposed by Section 701 of the Revenue Act of 1924 upon "Every person carrying on the business of a * * * retail liquor dealer * * * in any State * * * contrary to the laws of such State" can arise under that statute only in the event of a violation of law. If this be assumed to be sufficient, notwithstanding what this Court said the *One Ford Coupe* and *Murphy cases, supra,* to transform that "tax" into a penalty, we nevertheless submit that its recovery in this suit was justified.

It is clear, in the first place, that the constitutional grounds upon which the *Lipke* and *Regal Drug Co. cases* were decided have no application in this case, for recovery here was sought not by distraint upon an assessment made without notice or opportunity to be heard, as in those cases, but by a plenary suit in which the respondent was fully accorded, and availed himself of, the opportunity to appear and defend. The right of the Government to recover penalties in such a proceeding can not be doubted.

It is also clear, we submit, that Congress intended that the liquor taxes imposed by the internal revenue laws should be collected from persons illegally, as well as those legally, dealing in liquor, and that Congress did not intend by Section 5 of the Willis-Campbell Act to prevent the collection of taxes

imposed upon illegal dealings in liquor because of the enforcement of any criminal liability arising out of the same dealings. This appears from the following considerations:

Section 35, Title II, of the National Prohibition Act, declares:

> This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. * * * nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

The report of the Senate Judiciary Committee to accompany H. R. 6810, which became the National Prohibition Act, clearly indicates the purpose of Congress that the internal-revenue liquor taxes should apply to the traffic in illicit liquor.[3]

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[3] Senate Report No. 151, 66th Congress, 1st Session, p. 18, contained the following statement with reference to Section 36 of H. R. 6810, which later became Section 35, Title II, of the National Prohibition Act:

"TAX ON LIQUOR ILLEGALLY MANUFACTURED AND SOLD

"Section 36 provides for a tax upon liquors illegally manufactured and sold. This provision prevents the illicit liquor dealers from paying the tax, when they sell in violation of law, and at the same time is a very effective weapon for law enforcement.

"The suggestion that it is inconsistent to collect tax from an outlawed traffic is answered by the courts, which hold that a prohibitive tax is even more effective to secure the suppression of an outlawed traffic than the criminal laws.

"The rule of the court applying to the collection of these taxes on an outlawed traffic is stated in *License Tax Cases* (5 Wall., 462–475):

In *United States* v. *Yuginovich,* 256 U. S. 450, this Court recognized that the provisions of the internal revenue laws imposing taxes upon the manufacture and sale of intoxicating liquor had remained in force notwithstanding the National Prohibition Act and applied as well to liquor manufactured in violation of that Act as to liquor lawfully produced. Although holding in that case that Section 3257 of the Revised Statutes, which makes it an offense to defraud the United States of the tax on spirits distilled by one carrying on the business of a distiller, had been impliedly repealed by the National Prohibition Act because inconsistent therewith, the Court nevertheless observed (p. 462):

> That Congress may under the broad authority of the taxing power tax intoxicating liquors notwithstanding their production is

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"'There is nothing hostile or contradictory, therefore, in the acts of Congress to the legislation of the States. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction and tend to the same result.'

"In *Foster* v. *Speed* (120 Tenn. 470) the court said:

"'A business which is prohibited may be taxed. The imposition of the tax upon an outlawed business is often more efficient in supppressing it than statutes making it a criminal offense.'

"Judge Cooley, in his work on taxation (3 ed., 242), said:

"'On the other hand one purpose of taxation sometimes is to discourage the business and perhaps put it out of existence.'

"See also *Lyle* v. *Sears* (65 O. S. 49); *Burrel* v. *Holtz* (84 O. S. 4, 974)."

> prohibited and punished, we have no question.

And again (p. 464):

> *We agree with the court below that while Congress manifested an intention to tax liquors illegally as well as those legally produced,* which was within its constitutional power, it did not intend to preserve the old penalties prescribed in Section 3257 in addition to the specific provision for punishment made in the Volstead Act. (Italics ours.)

The Willis-Campbell Act, which was passed at the session of Congress next following the decision of the *Yuginovich case,* contains in Section 5 the following provision:

> That all laws in regard to the * * * taxation of * * * intoxicating liquor * * * that were in force when the National Prohibition Act was enacted shall be and continue in force * * *.

Furthermore, the report of the House Judiciary Committee on H. R. 7294, 67th Congress,[4] which

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[4] In H. Rep. No. 224, 67th Cong., 1st Sess., to accompany H. R. 7294, it was said (p. 3):

"Section 5 has been added to this bill as an amendment to meet a situation created by a decision of the Supreme Court, dated June 1, 1921, in which that court in effect held that the revenue laws applicable to the manufacture, taxation, and traffic in intoxicating liquor for beverage purposes are no longer in force. In the years past it has been deemed necessary to maintain the strictest kind of control over all kinds of liquor to prevent it from being made and sold without the payment of taxes, and there is if anything a greater

became the Willis-Campbell Act, shows beyond all question that Section 5 was designed to *insure,* rather than to curtail, the collection of taxes upon *illegal,* as well as legal, dealings in liquor, and that the liability for payment of taxes upon illegal dealings in liquor should exist independently of, and in

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necessity for such control at this time. There is no practical way of distinguishing between beverage and nonbeverage liquor, and there certainly can be no good reason why the man who makes liquor in violation of law should be dealt with more leniently than the man who makes it for lawful purposes. During the last year the Government collected more than $138,000,000 in revenue from liquor, and there is every reason to believe that the present rate of taxation will be maintained if it is not increased in the next revenue law.

"This section is important for another reason. Section 35 of Title II of the national prohibition act provides for an additional tax on the illegal manufacture and traffic in liquor over that imposed on liquor lawfully produced and sold. This tax was held to be valid in this decision of the Supreme Court, but decisions have been rendered by various district courts that would indicate that there is no effective remedy for its enforcement. A failure to make suitable provision for the enforcement of these taxes and penalties may mean a loss to the Government of many millions of dollars. There will no doubt be more than $50,000,000 of such taxes assessed before the end of the next fiscal year. The imposition of this tax is one of the most effective remedies against the law violators.

* * * * *

"There has been very little opposition to any of the provisions of this bill, and section 5 is simply seeking to reenact what was believed to be the law at the time the national prohibition act was passed. That act provides, Section 35, Title II, that it shall be construed as an addition to existing laws and that it shall not relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws."

addition to, any criminal liability arising out of those dealings.

Following the passage of the Willis-Campbell Act this Court decided, in *United States* v. *Stafoff*, 260 U. S. 477, that the new Act had the effect of reenacting the internal revenue laws held to have been impliedly repealed in the *Yuginovich case*. In that case this Court said (p. 480): "Of course Congress may tax what it also forbids. 256 U. S. 462."

In *United States* v. *One Ford Coupe, supra*, this Court again recognized the purpose of Congress that those unlawfully dealing in liquor should not be exempt from the payment of the liquor taxes imposed by the internal revenue laws. It said (272 U. S. 326-327):

> That Congress in enacting that law [National Prohibition Act] would intentionally have exempted illict liquor from taxation is not likely. Moreover, we are not dealing with the construction of the law as enacted in 1919. The Willis-Campbell Act, November 23, 1921, c. 134, § 5, 42 Stat. 222, 223, supplemental thereto, continued in force or reenacted, by express provision, all laws in regard to the taxation of intoxicating liquor not directly in conflict with the prohibitory legislation. Furthermore, the Revenue Act of 1921, November 23, 1921, c. 136, § 600, 42 Stat. 227, 285, enacted on the same day, shows that Congress had no intention then of relieving liquor from taxation merely because

> illegally dealt with. For it provided specifically that if distilled spirits, tax-paid for nonbeverage purposes, be diverted to beverage purposes, an additional tax of $4.20 per gallon must be paid, although under the law such diversion could not be made legally.

In the light of the statutes and decisions of this Court referred to we submit that it could not have been the intention of Congress in enacting Section 5 of the Willis-Campbell Act that the collection under the internal revenue laws of a tax upon the manufacture or sale of illicitly made liquor should bar a prosecution for such manufacture or sale under the National Prohibition Act, or *vice versa,* and that the Circuit Court of Appeals erred in holding the present action barred by Section 5.

II

THERE IS NO DOUBLE JEOPARDY [5]

Although the respondent assigned as error (R. 24) the overruling of his plea of double jeopardy, he failed at the time to except to that action by the court (R. 7). It would seem, therefore, that this contention is not now available to the respondent. *Rosen* v. *United States,* 271 Fed. 651, 653 (C. C. A. 2d); *Feinberg* v. *United States,* 2 F. (2d) 955, 956–957 (C. C. A. 8th).

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[5] Although the court below based its decision solely on its construction of Section 5 of the Willis-Campbell Act, other questions presented by the asignment of errors are discussed in points II and III.

Considering the question on the merits, we submit that the petitioner's contention of double jeopardy can not be sustained unless it is established: (1) that the items sued for are penalties for an "offense," (2) that the present suit is a proceeding to punish the respondent for this offense, (3) that the respondent has been convicted of this *same* offense, and (4) that it is beyond the power of Congress to provide that the respondent may be subjected *both* to a penalty, recoverable in a civil proceeding, and a criminal prosecution, for the same offense.

The only "offense" involved in the instant suit is that of unlawfully engaging in business as a retail liquor dealer. The Government contends, first, that this was not the offense of which the respondent was convicted. A single transaction may be the basis for several offenses. *Hebert* v. *Louisiana,* 272 U. S. 312. Thus, a conviction for the unlawful sale of liquor will not bar a subsequent prosecution for the unlawful possession of the same liquor. *Albrecht* v. *United States,* 273 U. S. 1. Similarly, a conviction for the sale of cocaine without the vendor being registered will not bar a subsequent prosecution for the sale of the same cocaine without a written order. *Yumvas* v. *United States,* 13 F. (2d) 347 (C. C. A. 5th). In the instant case the Government was required to establish not merely the unlawful sale of liquor—which alone was necessary for the prior convic-

tion (R. 3, 12)—but also that the respondent was a "retail liquor dealer." The evidence required to establish these two offenses is materially different. *Ledbetter* v. *United States*, 170 U. S. 606, 610; *Bailey* v. *United States*, 259 Fed. 88, 90 (C. C. A. 6th); *McNutt* v. *United States*, 267 Fed. 670, 674–675 (C. C. A. 8th).

We have already argued (*supra*, pp. 8–23) that Section 5 of the Willis-Campbell Act does not bar recovery of any of the items involved in this suit. Aside from that statute there can be no legal objection to the punishment of a single offense by the imposition of a penalty and by conviction followed by fine and imprisonment, and where it is clear that the penalty is intended to be in addition to the criminal prosecution a suit for the recovery of the penalty is not barred by a prior conviction of the defendant of the same offense for which the penalty is alleged to be due. The penalty is merely part of the punishment imposed, and it is immaterial that its recovery is sought in a separate action.

The Court of Appeals of New York in *People* v. *Meakim*, 133 N. Y. 214, quoted the statement of the rule in an earlier case as follows (p. 224):

> It is undoubtedly competent for the legislature to subject any particular offense both to a penalty and a criminal prosecution. It is not punishing the same offense twice. They are but parts of one punishment. They both constitute the punishment which the

> law inflicts upon the offense. That they are enforced in different modes of proceeding, and at different times, does not affect the principle. It might as well be contended that a man was punished twice when he was both fined and imprisoned, which he may be in most misdemeanors.

See *Stout* v. *State*, 36 Okla. 744; *Haddad* v. *State*, 23 Ariz. 105. See also Bishop on Criminal Law (9th Ed.), Vol. 1, Sec. 990 (2).

The same conclusion is reached by the Federal courts. The case of *In re Leszynsky*, Fed. Cas. No. 8,279 (C. C. S. D. N. Y.), involved Section 3318, Revised Statutes, which imposed a penalty of $100, as well as a fine and imprisonment, for failure to keep a record of spirits distilled. In holding that a criminal action against the defendant was not barred by a prior civil suit to collect the statutory penalty, Judge Blatchford said (p. 399):

> But, in the eye of the law, the three punishments are only one punishment for the same offence, although the penalty of $100 may be recovered in a civil action, and the fine and imprisonment are inflicted by a criminal prosecution. The statute book has many like provisions for punishment of offences, where a penalty to be recovered by a civil action is given, and a fine and imprisonment, or one of them, on a criminal conviction, is prescribed in addition and cumulatively, by the use of the word "and." Provisions for punishment by the forfeiture of

> property, which must be enforced in a civil action, and, cumulatively and in addition, by fine and imprisonment, or one of them, on a criminal conviction of the same offence for which the forfeiture of property is prescribed, are of the same character. * * * Penalties and forfeitures given by statute are to be enforced by civil suits. Rev. St. sec. 563, subd. 3; Id. sec. 919. Fine and imprisonment are to be inflicted as the result of a conviction on a criminal prosecution. Different methods are to be resorted to to enforce the different parts of what is one and the same punishment. But, the fact that the two methods may be progressing simultaneously and one be completed before the other, or that one may be fully completed before the other is commenced, can not have the effect to annul the provision of law in regard to the uncompleted part. * * *

See also *United States* v. *Three Copper Stills*, 47 Fed. 495; *United States* v. *Trobe*, Fed. Cas. 16,541.

Section 5 of the Willis-Campbell Act provides:

> All taxes and tax penalties provided for in section 35 of Title II of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor.

Assuming that the taxes and penalties provided by Section 35 are not properly taxes, but penalties or fines for criminal misconduct, nevertheless it

seems that the ordinary method of collecting such penalties is by a separate civil suit. R. S., Sections 3213–3216 (U. S. C., Title 26, Sections 142–145); R. S., Sections 563 (3), 919 (U. S. C., Title 28, Sections 41 (9), 732). See *Hepner* v. *United States,* 213 U. S. 103. There is no requirement in the double jeopardy provision of the Fifth Amendment that the entire punishment meted out to a defendant for the commission of an offense be determined in one judicial proceeding. This Court and other courts have held that although a defendant has been tried and convicted of an offense he may thereafter be brought into court and upon proof of an earlier conviction be sentenced to additional or increased imprisonment. *Graham* v. *West Virginia,* 224 U. S. 616; *State* v. *Zywicki,* 175 Minn. 508.

In the instant case it is manifest from the discussion under Point I that Congress intended the criminal provisions of the National Prohibition Act and the tax or penalty provisions to be cumulative and not alternative. This intention is emphasized by the subsequent enactment of the Willis-Campbell Act, specifically continuing in force all nonconflicting revenue statutes. At no place in the Act or the Supplemental Act is it suggested that the Government must elect to sue either for the tax and penalties or proceed criminally. Section 35 of the Act specifically provides that the payment of the taxes and penalties therein provided shall not "re-

lieve anyone from criminal liability." This is an explicit statement of intention.

The following decisions support the contention above advanced: *United States* v. *Mt. Clemens Beverage Co.*, 23 F. (2d) 885 (E. D. Mich.); *United States* v. *Bullinger*, 290 Fed. 395 (E. D. N. Y.).

The cases relied upon by the respondent in the court below to sustain the contention of double jeopardy are mostly cases (1) where it was not clear that the statutory penalties were intended to be cumulative (*United States* v. *Gates*, Fed. Cas. 15,191 (S. D. N. Y.); *United States* v. *McKee*, Fed. Cas. 15,688 (C. C. E. D. Mo.)), or (2) cases holding that where an issue as to the existence of an act or fact has been tried in a criminal prosecution a judgment of *acquittal* is conclusive in a later suit *in rem*, for forfeiture of the defendant's property, where as against the defendant the existence of the same act or fact is in issue (*Coffey* v. *United States*, 116 U. S. 436; *United States* v. *2,180 Cases of Champagne*, 9 F. (2d) 710). In the case of *Murphy* v. *United States*, 272 U. S. 630, wherein an *acquittal* under Section 21, Title II, of the National Prohibition Act on a charge of maintaining a nuisance was held not to bar a proceeding under Section 22 to abate the nuisance, it was merely held that the rule of the *Coffey case* did not apply where the subsequent proceeding was not intended to impose a penalty upon the defendant.

There is language in *United States* v. *Chouteau*, 102 U. S. 603, 610, which tends to support the con-

tention of the respondent, but the facts of that case show that a compromise was entered into whereby the defendant paid to the Government a certain sum "in full satisfaction * * * of said indictments and prosecutions," which indictments the court found to "constitute the whole ground and cause of the present action." (P. 610.) In other words, the parties had effected a settlement of the very offense for which the Government sought subsequently to collect the statutory penalty from the defendant's surety. Upon its facts the *Chouteau case* is clearly distinguishable.

III

PARAGRAPH 9, SECTION 701 OF THE REVENUE ACT OF 1924 IS CONSTITUTIONAL

The respondent contended in the court below that the tax imposed by Section 701 upon "Every person carrying on the business of a * * * retail liquor dealer * * * in any State * * * contrary to the laws of such State" was in effect a penalty imposed for violation of State law and therefore repugnant to the Tenth Amendment in that it encroached upon the power reserved to the States to determine the punishment to be imposed for infractions of their laws. We submit that the contention is without merit.

In the first place, the exaction in question is, as the name given it in the statute implies, a tax. Considered as such, it can not, in view of the decision of this Court in the *License Tax Cases,* 5

Wall. 462, be held to be unconstitutional because imposed in consequence of an act which is a violation of State law. The cases cited involved the validity of indictments for violations of Acts of Congress prohibiting any person from engaging in the business of selling lottery tickets or of retail dealing in liquor without obtaining a license from the United States and paying a special tax. It was argued on behalf of the defendants that as the sale of lottery tickets and the dealing in liquor were prohibited by State law, the legislation upon which the indictments were based was unconstitutional. In upholding the power of Congress to impose these taxes, this Court said (p. 473):

> There is nothing hostile or contradictory * * * in the acts of Congress to the legislation of the States. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction and tend to the same result. It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of the State to be a justification for the violation of the laws of the Union.

We furthermore contend that even if regarded as a penalty the "tax" here involved is not open to the constitutional objection urged by the respondent. Prior to the adoption of the Eighteenth

Amendment this Court upheld the validity of the Webb-Kenyon Law (Act of March 1, 1913, c. 90, 37 Stat. 699), prohibiting the transportation in interstate commerce into any State of intoxicating liquor for purposes prohibited by the laws of such State (*Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311), and also the validity of the Reed Amendment (Act of March 3, 1917, c. 162, 39 Stat. 1058, 1069), prohibiting such transportation of intoxicating liquor into any State whose laws prohibited the manufacture or sale therein of intoxicating liquor for beverage purposes (*United States* v. *Hill*, 248 U. S. 420). Regarding the power of Congress to regulate interstate commerce, the Court in the case last cited said (p. 425):

> Congress may exercise this authority in aid of the policy of the State, if it sees fit to do so.

The power conferred upon Congress by the Eighteenth Amendment to enforce its provisions by appropriate legislation may be exercised throughout the entire territorial limits of the United States and "is in no wise dependent on or affected by action or inaction on the part of the several States of the Union." *National Prohibition Cases*, 253 U. S. 350, 387. In the exercise of that power Congress may adopt any appropriate means to make the prohibition of the traffic in intoxicating liquors effective. *Everard's Breweries* v. *Day*, 265 U. S. 545, 560; *Selzman* v. *United States*, 268 U. S. 466, 468–469.

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed.

Respectfully submitted.

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APPENDIX

STATUTES INVOLVED

Section 35, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 317 (U. S. C., Title 27, Sec. 52) provides:

> All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

* * * * *

Section 5 of the Willis-Campbell Act, c. 134, 42 Stat. 222, 223 (U. S. C., Title 27, Sec. 3) provides:

> That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties provided for in section 35 of Title II of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor.
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> * * * * *

Section 701, Paragraph 9, of the Revenue Act of 1924, c. 234, 43 Stat. 253, 327 (U. S. C., Title 26, Sec. 206) provides:

> Every person carrying on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquor, retail dealer in malt liquor, or manufacturer of stills, as defined in section 3244 as amended and section 3247 of the Revised Statutes, in any State, Territory, or District of the United States contrary to the laws of such State, Territory, or District, or in any place therein in which carrying on such business is prohibited by local or municipal law, shall pay, in addition to all other taxes,

special or otherwise, imposed by existing law or by this Act, $1,000. The payment of the tax imposed by this subdivision shall not be held to exempt any person from any penalty or punishment provided for by the laws of any State, Territory, or District for carrying on such business in such State, Territory, or District, or in any manner to authorize the commencement or continuance of such business contrary to the laws of such State, Territory, or District, or in places prohibited by local or municipal law.

The taxes imposed by this section shall, in the case of persons upon whom a corresponding tax is imposed by section 1001 of the Revenue Act of 1921, be in lieu of such tax.

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